Supreme Court, U.S.
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No. 97-1171

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

In re the Marriage of MARY K. and JAMES M. ODDINO

MARY K. ODDINO, Petitioner,

v.

JAMES M. ODDINO, Respondent;

HUGHES NON-BARGAINING RETIREMENT PLAN, Respondent.

On Petition for a Writ of Certiorari to The California Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Do California state courts have subject matter jurisdiction to decide whether a state domestic relations order assigning retirement benefits to the nonemployee spouse satisfies the requirements for qualification under Section 1056 of the Employee Retirement Income Security Act of 1974, as amended ("ERISA")?

2. Does a domestic relations order qualify under ERISA § 1056(d)(3)(E)(i)(II) if it requires the retirement plan to pay the nonemployee spouse a portion of the employee spouse's early retirement benefits without any actuarial reduction, where the employee spouse is eligible for such unreduced benefits upon early retirement but has not yet retired?

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STATEMENT OF THE CASE

Petitioner Mary K. Oddino has asked this Court to review three questions she perceives as arising from a decision of the California Supreme Court concerning the ERISA, codified at 29 U.S.C. Section 1001 *et seq.*[1] The California Supreme Court's decision addresses two discrete issues: (1) whether state courts have jurisdiction to determine whether a domestic relations order is qualified under ERISA § 1056 and (2) whether a domestic relations order that requires the payment of unreduced early retirement benefits to a nonemployee spouse when the employee spouse has not retired satisfies the requirements for qualification under Section 1056. The specific questions presented by Petitioner were not expressly discussed in the California Supreme Court's decision. Moreover, two of the questions presented by Petitioner do not exist under the facts of this case. As discussed in detail below, the California Supreme Court's decision does not conflict with any decision of another state supreme court or any federal court, and the Petition raises no basis that warrants review by this Court.

A. Facts Of The Case.

This case involves an incentive for early retirement offered through the Hughes Non-Bargaining Retirement Plan (the "Plan") to employees of Hughes Electronics Corporation ("Hughes"). Hughes is the successor to Hughes Aircraft Company as the sponsor and a funding source for the Plan. The Plan is a "defined benefit" plan, which means that the pension benefit for the life of the retiree is calculated on the basis of a fixed monthly amount. The assets of the Plan are

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[1] References to "ERISA" in this Opposition are to the provisions as codified in U.S. Code, Title 29.

held in a trust fund for all participants. No particular funds are set aside for any individual. ERISA requires that Hughes contribute to the Plan so that it is funded according to reasonable actuarial assumptions.[2] ERISA § 1082(c)(3). ERISA's funding requirements are established so "plans will accumulate assets within a reasonable time to pay benefits to covered employees when they retire." Conference Committee Report accompanying ERISA ("ERISA Conference Report"), H.R. Conf. Rep. No. 93-1280, 93rd Cong., 2d Sess. (1974), reprinted in 1974 U.S. Code Cong. & Ad. News 5038, 5064.

The Plan's normal rule is that if benefits commence before age 65, the monthly benefit is reduced from the level that would have been paid at age 65. The purpose for the reduction is to ensure that -- on average -- the overall cost of benefits for an early retiree is not more than the overall cost for an individual who retires at age 65. Without a reduction in the monthly benefit paid to an early retiree, the overall cost of benefits to an early retiree would be higher than for an employee who retires at age 65 because benefits paid to an early retiree commence sooner and are thus (on average) paid over a longer period.

Despite the general rule that monthly benefits are reduced for early retirees, Hughes, as sponsor of the Plan, designed the Plan to provide an incentive for early retirement for employees who retire after reaching at least age 55, with

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[2] For example, the amount needed in the pension trust depends upon assumptions about the dates participants retire, the investment return on trust assets, and the projected rate at which participant wages will increase. A professional actuary is required to develop assumptions about such events and calculate the required employer contributions so that a pension plan has funds when needed.

at least 20 years of service (or any combination of at least 55 years of age and years of service which totals at least 75). This early retirement incentive has been referred to as the "Rule of 75." If an employee qualifies under the Rule of 75, there is no reduction to the monthly benefit for early retirement. An employee who accepts the incentive to retire early will receive benefits that are much more valuable in the aggregate than the benefits for an employee who retires at age 65. This is because under the Rule of 75, an early retiree can begin receiving at age 55 the same monthly benefit as an individual who commences benefits at age 65. Since the monthly benefits for an employee who accepts the Rule of 75 inducement commence as early as age 55, and the amount of the monthly benefits are not reduced, the aggregate value of the benefit is much higher for the employee who accepts the early retirement inducement. The Rule of 75 provides a powerful inducement to retire early, and, of course, eligible employees must actually retire in order to receive the enchanced benefits. The actuarial assumptions used for determining Hughes' required Plan contributions must by law take into account the expected extent to which employees will accept Rule of 75 benefits by retiring early. Rev. Rul. 78-331, 1978-2 C.B. 158. Thus, the Plan is funded according to the expected rate at which the enhanced early retirement benefit will be paid to employees who actually retire.

Although the incentive offered by the Rule of 75 increases the cost to Hughes of funding the Plan through contributions, encouraging early retirement can satisfy Hughes' corporate goals by saving costs of the employee's continued employment, such as wages, insurance, and workers' compensation coverage. These costs can be saved if the retiring employee is not replaced at all or is replaced with a more junior employee at a lower salary.

Furthermore, encouraging early retirement can reduce the risk of litigation that could result from involuntary layoffs. This Court recently endorsed the use of early retirement inducements to obtain the *quid pro quo* of actual retirement. *Lockheed Corp. v. Spink*, __ U.S. __, 116 S. Ct. 1783, 1791-92, 135 L. Ed. 2d 153 (1996).

James M. Oddino was a Hughes employee and a Plan participant during the relevant time period. On March 24, 1989, the California Superior Court, County of Los Angeles entered a "Stipulation and Order Re Modification of Interlocutory Judgment and Qualified Domestic Relations Order" (the "Order"). (Pet. App. 41.)[3] Pursuant to the Order, the Superior Court awarded Petitioner 36.6231% of the benefit earned by James Oddino through April 1, 1988, and it directed that the Plan make payments directly to Petitioner. (Pet. App. 42.) The Order provided that payments were to commence April 1, 1988, "or as soon thereafter as practical." On approximately April 5, 1989, Hughes, the Plan administrator, received the Order. Hughes determined that the Order constituted a "qualified domestic relations order" as defined in ERISA § 1056(d)(3) (a "QDRO")[4], and commenced payments to Petitioner in

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[3] "Pet. App. 41" refers to page 41 of Petitioner's Appendix submitted with the Petition. Similar references will be made throughout this Opposition.

[4] ERISA § 1056 generally prohibits any alienation of a participant's benefits under a retirement plan. ERISA § 1056(d) provides an exception to the anti-alienation provision for a domestic relations order declaring the ownership rights of a divorcing spouse if the plan administrator determines that such order satisfies all of the requirements of Section 1056(d). If the plan administrator determines that the order satisfies the requirements of Section 1056(d), the order becomes a "qualified domestic relations order" or "QDRO."

March, 1990. Hughes' determination that the Order was a QDRO was premised upon its understanding that the Order did not require payment of the Rule of 75 enhanced early retirement benefit because the participant, James Oddino, remained employed by Hughes. Hughes also determined that if the Order required payment of the Rule of 75 benefit prior to James Oddino's actual retirement, the Order **would not** qualify as a QDRO.

On March 31, 1990, Petitioner joined the Plan as a party to the dissolution proceeding. Pursuant to an order to show cause, Petitioner requested that the Superior Court order the Plan to pay her share of benefits based upon the Rule of 75, notwithstanding James Oddino's continued employment. The Superior Court correctly upheld Hughes' determination that the Order did not require benefits based upon the Rule of 75, and it refused to order payment of the Rule of 75 benefit. (Pet. App. 38.) The California Court of Appeal reversed. Notwithstanding the fact that James Oddino had not retired early, it held that the Rule of 75 early retirement benefit should be paid to Petitioner. (Pet. App. 27-36.)

The California Supreme Court granted review and reversed the California Court of Appeal.[5] The California Supreme Court considered two questions. First, do California courts have subject matter jurisdiction to determine whether a state court domestic relations order assigning retirement plan benefits is a QDRO? The California Supreme Court ruled that ERISA § 1132(e)(1), which provides for concurrent state and federal jurisdiction

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[5] The grant of review by the California Supreme Court and its reversal of the California Court of Appeal's decision caused the California Court of Appeal's decision to be vacated.

over claims arising under ERISA § 1132(a)(1)(B), provides jurisdiction for state courts to determine whether domestic relations orders are QDROs. (Pet. App. 16.) Second, does an order qualify as a QDRO if it requires the retirement plan to pay the nonemployee spouse a portion of the employee spouse's early retirement benefits without any actuarial reduction, where the employee spouse is eligible for such unreduced benefits upon early retirement but has not yet retired? The California Supreme Court ruled that an order requiring such payments cannot be a QDRO under ERISA § 1056(d)(3)(E)(i)(II). (Pet. App. 18-19.)

B. Correction Of Misstatements In The Petition.

Rule 15.2 of the Rules of the Supreme Court of the United States provides:

> "In addition to presenting other arguments for denying the petition, the brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted. Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in a petition. Any objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court's attention in the brief in opposition."

The Petition contains numerous misstatements of fact that are unsupported by the record below as well as misstatements of the proceedings below.

1. Misstatements Of The Factual Record Below.

At page 3, footnote 1, Petitioner purports to set out statistics concerning the assets and liabilities of the Plan and other plans. The statistics are not part of the record below. Moreover, Petitioner states that the assets of the Plan exceed its liabilities by an amount in excess of $5 billion, but the liability amount she refers to does not include the Plan's liabilities for benefits owed to participants and beneficiaries.

At page 3, footnote 2, Petitioner purports to describe certain aspects of defined benefit plans in general, as well as the Plan. Although the Plan does not endorse Petitioner's general description, the disagreement with her general description is probably immaterial. However, footnote 2 incorrectly states that the Plan contains a "normal retirement age benefit." Petitioner attempts to distinguish this "normal retirement age benefit" from the Plan's Normal Retirement Benefit. The Plan has a Normal Retirement Benefit which commences at age 65. The concept of a "normal retirement age benefit," as distinct from the Normal Retirement Benefit, does not exist in the Plan. (Supp. C.T. at 33.)[6]

At pages 3 and 4, the Petition incorrectly states that the Plan confirmed that Petitioner would receive a certain amount of monthly benefits. The Plan prepared estimates of

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[6] "Supp. C.T. at 33" refers to page 33 of the Supplemental Clerk's Transcript in the proceedings below.

benefits at the request of James Oddino. (II C.T. at 261.)[7] He asked the Plan's administrator to provide an estimate of the benefit he would receive if he retired on April 1, 1988. He also asked the Plan's administrator to include an estimate of Petitioner's share of those benefits. Both estimates were provided to James Oddino. He apparently gave Petitioner the estimate referring to her share of his benefit. The estimate referring to Petitioner's share of James Oddino's benefit was not an estimate of the benefit Petitioner would receive if she commenced payment under a QDRO prior to the time James Oddino retired. The Superior Court's factual findings are consistent with this. The Superior Court found that the estimate of benefits payable was requested by James Oddino rather than Petitioner, and that the Plan did not know when James Oddino would retire. (Pet. App. 37-38).

At page 4, the Petition states that on April 1, 1988, James Oddino had earned the Plan's early retirement benefit under the Rule of 75. At that time, James Oddino had sufficient age and service to be entitled to retire and receive the Rule of 75 benefit. However, he had not earned the benefit as of that date because he had not retired.

At page 4, footnote 4, the Petition incorrectly states that the "plan determines the [Early Retirement Benefit (the "ERB")] as of the actual or assumed date of separation and it may be paid later actuarially increased." The ERB may only be paid upon actual separation, not on an assumed date of separation. If a participant has satisfied the age and service requirements for early retirement under the Rule of 75, actuarial increases are not provided for delayed retirement. (Supp. C.T. at 47.) Footnote 4 also incorrectly

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[7] "II C.T. at 261" refers to Volume II, page 261 of the Clerk's Transcript in the proceedings below.

states that the "ERB annuity is the same as the annuity in the Accrued Benefit also determined on the date of separation." Under the Plan, the ERB does not constitute the Accrued Benefit. Footnote 4 also incorrectly states that the "Plan has no provision to pay the Accrued Benefit except as an ERB per the Rule of 75." Under the Plan, a participant's Accrued Benefit is the Normal Retirement Benefit earned by a participant. The benefit under the Plan is paid as a Normal Retirement Benefit if the participant retires at age 65, or a Late Retirement Benefit if the participant retires after age 65. If a participant retries early after satisfying the conditions for the Rule of 75 benefit, the benefit is paid as the Rule of 75 benefit. If a participant who had not satisfied the age and service requirements for the Rule of 75 retires early, the participant is entitled to an actuarially-reduced early retirement benefit. (Supp. C.T. at 44-49.)

At pages 4 and 5, the Petition misstates the substance of correspondence between Hughes and Petitioner's representatives. The substance of the correspondence was whether the Plan's Rule of 75 benefit constituted a subsidy that could not be paid under a QDRO prior to a participant's actual retirement. (II C.T. at 237.)

Footnote 5 of the Petition incorrectly states that the "assumption of actual retirement is in both the Plan and ERISA." Neither the Plan nor ERISA contains such an assumption. Footnote 5 further incorrectly states that the Plan has three normal retirement benefits. The Plan has only one normal retirement benefit, which is the benefit commencing at the Plan's normal retirement age of 65. The Plan does not contain the term "Normal Retirement Age Benefit." (Supp. C.T. at 44.) The term is apparently Petitioner's invention.

At page 5, the Petition incorrectly states that the Plan revealed that it had paid Petitioner a percentage of an actuarially-reduced "vested retirement benefit." Petitioner was assigned a portion of James Oddino's accrued normal retirement benefit, which was paid after actuarial reduction. The payment was not miscalculated, and the Plan did not say that the payment was miscalculated. (II C.T. at 368.)

At page 5, footnote 8, the Petition misstates certain aspects of the operation of the Plan and ERISA. The Plan does not, and is not required to, contain an "NRAB," as distinct from a normal retirement benefit. ERISA § 1054(b)(1) provides that a plan may satisfy any one of three methods of determining a participant's accrued benefit. The Petition refers only to one of those methods.

At page 6, the Petition incorrectly states that the Order's formula for payment required that Petitioner be paid a percentage of the Plan's early retirement benefit, and that payment of that benefit was authorized pursuant to ERISA. The Order required payment of a percentage of James Oddino's accrued benefit. (Pet. App. 42.) The extent to which ERISA authorizes the payment of early retirement benefits was the subject of the California Supreme Court's decision.

At page 6, the Petition incorrectly states that following the grant of a rehearing in the California Court of Appeal, the Plan retracted its determination that the domestic relations order was a QDRO. The Plan's position has been consistent throughout this litigation: If the Order is interpreted to require payment of the Rule of 75 benefit, it can not be a QDRO. If the Order does not require payment of the Rule of 75 benefit, it is a QDRO. (Supp. C.T. at 13.)

At page 9, footnote 17, the Petitioner implies that Section 4.2(c) of the Plan refers to more than one normal retirement benefit. The actual reference is to the Plan's normal, early and late retirement benefits. (Supp. C.T. at 45.)

2. Misstatements As To The Proceedings Below.

In an attempt to manufacture issues, the Petition also contains numerous misstatements as to the proceedings below.

At page 5, the Petition states that the California Superior Court found that the QDRO constituted a waiver of Petitioner's rights to an order for the balance of her payments from James Oddino. The court actually stated as follows: "Pursuant to the stipulation of the Petitioner and the Respondent [James Oddino] the Court did not rule on Petitioner's request for relief against Respondent." (Pet. App. 39.) No mention of a waiver (caused by the QDRO or otherwise) was made.

At page 6, footnote 9, the Petition purports to find a federal question posed by the Superior Court as to whether the QDRO waived state claims against the employer or ex-spouse. No such question was posed by the Superior Court. (Pet. App. 37-39.)

At page 6, the Petition incorrectly states that the Superior Court did not rule on the effective date of Petitioner's payments. The Order provided that payments were to commence on April 1, 1988, or as soon thereafter as practical. The Superior Court ruled that the payments had not been unreasonably delayed. (Pet. App. 38.)

At page 6, the Petition incorrectly states that the United States Department of Labor sought review in the California Supreme Court. The Plan asked the California Supreme Court to review the case, and the California Employment Law Council (among others) urged the California Supreme Court to review the case. The Department of Labor allowed the Plan to inform the California Supreme Court that if review were granted, it would seek permission to participate as an amicus.

At page 7, the Petition incorrectly states that the California Supreme Court refused to consider the legislative history of the Retirement Equity Act and certain provisions of ERISA. Petitioner's briefs set forth her arguments concerning these provisions, and the California Supreme Court properly rejected her arguments.

At page 8, the Petition incorrectly states that the California Supreme Court "determined that every ERB contained a subsidy...." The California Supreme Court's decision contains no express statement to that effect, and the logic of the opinion does not compel that result. The California Supreme Court found that the specific early retirement benefit at issue (the Plan's Rule of 75) contained a subsidy. (Pet. App. 24.)

At pages 8-10, the Petition restates a number of the arguments Petitioner made before the California Supreme Court, all of which were properly rejected. These include an argument that the Rule of 75 cannot be an "employer subsidy for early retirement" under ERISA § 1056(d)(3)(E)(i)(II) because it is paid by the Plan, and

various arguments related to her theory that actual retirement is not required for payment of the Rule of 75 benefit.[8]

REASONS FOR DENYING THE PETITION

I. THE PETITION RAISES NO JURISDICTIONAL ISSUE THAT WARRANTS REVIEW BY THIS COURT.

The jurisdictional issue before the California Supreme Court was whether California courts have jurisdiction to determine whether domestic relations orders dividing ERISA retirement plan benefits satisfy the qualification requirements of federal law. As set forth in its decision, the California Supreme Court held that actions to determine the qualified status of a domestic relations order arise under ERISA § 1132(a)(1)(B) and, therefore, state courts have concurrent jurisdiction under ERISA § 1132(e)(1) to make such determinations. (Pet. App. 16.) As discussed below, the jurisdictional issues that the Petition attempts to raise result from a tortured reading of ERISA that the California Supreme Court correctly rejected. Accordingly, the Petition should be denied.

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[8] The Plan disagrees with the arguments and characterizations of the California Supreme Court's decision set forth on pages 8-10. One particular disagreement is worth pointing out. The Petition incorrectly states that requiring actual retirement as a precondition of receipt of the Rule of 75 benefit is an "inferred quid pro quo, admittedly an unwritten benefit to the employer sponsor...." The written terms of Plan expressly require retirement as a condition of payment of the Rule of 75 benefit, and the Plan has not admitted otherwise. (Supp. C.T. at 48.)

A. There Is No Standing Issue In This Case.

Petitioner first contends that a writ of certiorari should be granted because of a purported standing issue. Petitioner incorrectly contends that while the California Supreme Court held that state courts have concurrent jurisdiction to require a domestic relations order to be treated as a QDRO, she would have no standing to assert a claim until the plan administrator has determined that the domestic relations order is a QDRO. In essence, Petitioner contends that because Congress granted beneficiary status to alternate payees under QDROs, it necessarily denied putative alternate payees under domestic relations orders standing under ERISA to seek qualification of their orders. Thus, Petitioner asks this Court to consider whether the California Supreme Court's decision "violate[s] the statutory denial of beneficiary status" to putative alternate payees under ERISA § 1056(d)(3)(J). (Pet. at i.) As discussed below, there is no standing issue in this case concerning Petitioner specifically or concerning putative alternate payees generally.

ERISA § 1056(d)(3)(J) provides that an alternate payee under a QDRO is treated as a beneficiary under ERISA. A beneficiary may bring a number of causes of action under ERISA, including an action under Section 1132(a)(1)(B). Petitioner incorrectly assumes that if the plan administrator has not recognized her domestic relations order as a QDRO, and, therefore, has not recognized her as a beneficiary, she does not have standing to bring an action under ERISA to attempt to prove that she is a beneficiary. Petitioner is wrong because she does not need to prove status as a beneficiary to have standing, she merely needs a colorable claim of beneficiary status. This Court has already addressed a similar issue as it related to the term "participant." *Firestone Tire & Rubber Co. v. Bruch,* 489

U.S. 101, 117, 109 S. Ct. 948, 958, 103 L. Ed. 2d 80 (1989). In *Firestone*, this Court held that a person has standing as a participant if he or she has a "colorable claim" to vested benefits. 489 U.S. 117, 109 S. Ct. 958. The claimant may show that he or she "may become eligible" for benefits by making a colorable claim that eligibility requirements will be fulfilled in the future. *Id.* Clearly, upon the issuance of a domestic relations order that conforms to the requirements of Section 1056, Petitioner, and other alternate payees, may become eligible for benefits as a beneficiary. It is absurd to contend that a spouse with a colorable claim to benefits as an alternate payee under a domestic relations order would have no standing to seek to have the domestic relations order qualified. The California Supreme Court's decision is consistent with the *Firestone* holding concerning standing, and it does not conflict with any other reported decision. Thus, the California Supreme Court's decision raises no standing issue that warrants review by this Court.

B. ERISA's Preemption Clause Does Not Supplant Its Jurisdiction Provisions.

The Petition also contends that review by this Court is warranted based upon a contention that ERISA § 1144 means something different than exactly what it says. In essence, Petitioner contends that ERISA's preemption clause supplants its jurisdiction clause, and, thus, ERISA's enforcement section does not apply at all to this case. (Pet. at 14.) The California Supreme Court correctly rejected Petitioner's illogical and unsupported contention.

ERISA's preemption clause states that the provisions of ERISA "supersede any and all State laws [that] relate to any employee benefit plan . . .." ERISA § 1144(a). "State

laws" under the preemption clause include all decisions or other State action having the effect of law. ERISA § 1144(c)(1). However, the preemption clause further states that it "shall not apply to **qualified domestic relations orders** . . .." ERISA § 1144(b)(7) (emphasis added). The preemption exemption for QDROs in Section 1144(b)(7) means no more than what it says -- qualified domestic relations orders, even though they are state decisions having the effect of law, are not subject to a preemption defense. The preemption exemption says nothing about jurisdiction. In an incredible leap of logic, Petitioner contends that the preemption exemption for QDROs should be read so broadly as to supplant ERISA's express jurisdiction provision. In her view, Section 1144(b)(7) exempts from preemption all state laws "relating to" domestic relations orders, including jurisdictional laws.

Petitioner's argument stems from the fact that QDROs are exempted from both the anti-alienation and preemption provisions of ERISA. ERISA §§ 1056(d)(3) and 1144(b)(7). Petitioner incorrectly perceives a significant overlap between the preemption and anti-alienation provisions because she incorrectly believes that Section 1056 and Section 1144 are both preemption provisions.[9] In her view, any overlap in the preemption and anti-alienation exemptions for QDROs must be eliminated by dramatically expanding the preemption exemption. This Court has concluded that any overlap between the preemption and anti-

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[9] Petitioner misapprehends the difference between ERISA's preemption clause and ERISA's substantive plan regulation. Section 1056 is not a preemption provision. Section 1056 regulates the alienation of pension benefits, and it applies regardless of whether state or federal law is the basis for alienation. Section 1144 addresses the preemption of state laws by virtue of ERISA's legislative scheme as a whole.

alienation exemptions exists merely because Congress wanted to ensure that ERISA's preemption of state laws could not be used to render a QDRO void. *Mackey v. Lanier Collection Agency*, 486 U.S. 825, 837, 108 S. Ct. 2182, 2190, 100 L. Ed. 2d 836 (1988).[10] Petitioner contends that *Mackey* somehow illustrates a tension between ERISA's pre-emption and anti-alienation provisions that should be resolved by finding that ERISA's enforcement scheme has no application in determining whether a domestic relations order is qualified. There was no jurisdictional issue in *Mackey*; and *Mackey* is not authority to supplant ERISA's express jurisdiction provision.

In *Boggs v. Boggs*, ___ U.S. ___, 117 S. Ct. 1754, ___L. Ed. 3d ___ (1997), this Court stated that "[a] domestic relations order must meet certain requirements to qualify as a QDRO. *See* §§ 1056(d)(3)(C)-(E)." 117 S. Ct. 1763. The substantive issue in this case involves interpretation of these very provisions regulating the qualification of domestic relations orders. There is no indication in *Boggs* or any other federal court decision that ERISA's enforcement scheme under Section 1132 has no part in determining whether such requirements have been met. The California Supreme Court held that ERISA's benefit claim enforcement mechanism (Section 1132(a)(1)(B)) is available to alternate payees seeking qualification of a domestic relations order. Such holding does not conflict with any decision of this Court or any other reported decision. Thus, the Petition does not raise any jurisdictional issue that warrants review by this Court.

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[10] The *Mackey* majority expressly stated that some overlap may occur in the preemption area given that provisions of the preemption clause were enacted at different times in response to judicial decisions that "were not of Congress' liking." *Id.*, 486 U.S. at 837 n.14. -

II. NO ISSUE REGARDING THE TREATMENT OF EARLY RETIREMENT BENEFITS WARRANTS REVIEW.

Petitioner's second question presented for review was not explicitly considered by the California Supreme Court. As explained below, although Petitioner raised the issue as one of her arguments before the California Supreme Court, it does not arise under the facts of this case.

Petitioner's second question implies that the California Supreme Court's decision prohibits a QDRO from determining benefits by "referencing" an early retirement benefit. The decision, however, did not consider whether a **reference** to an early retirement benefit would make a domestic relations order ineligible for QDRO status. Instead, the California Supreme Court considered whether the Plan's Rule of 75 early retirement benefit may be **paid** under a QDRO before the participant retires. The California Supreme Court appropriately held that such benefit may not be paid under a QDRO before the participant retires.

The question that Petitioner seeks to have this Court decide can best be understood in the context of the question the California Supreme Court actually decided. Subsection (A) below discusses the issue decided by the California Supreme Court, and subsection (B) below discusses the issue raised by Petitioner.

A. ERISA And Its Legislative History Limit The Value Of Payments That May Be Distributed Before The Employee Spouse's Retirement.

In general, ERISA prohibits the assignment or alienation of retirement benefits. An exception is made for payments to an "alternate payee" (*e.g.*, Petitioner) under a QDRO. ERISA §§ 1056(d)(1) and 1056(d)(3). An order cannot be a QDRO if it requires "a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan." ERISA § 1056(d)(3)(D)(i). Normally, of course, benefit payments cannot start before the participant actually retires, and an order that requires such payments would -- but for a limited exception that was at the core of the California Supreme Court's decision -- violate the prohibition against benefits not otherwise provided in the plan. The critical exception at issue below relates to certain permissible payments made to an alternate payee after a participant has reached the "earliest retirement age." ERISA § 1056(d)(3)(E)(i). It is this earliest retirement age exception that permits **limited** payments to be made to Petitioner under a QDRO while James Oddino remained employed.[11]

The earliest retirement age exception contains an explicit rule stating how Petitioner's benefit must be calculated. Payments made to an alternate payee prior to the

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[11] Section 1056(d)(3)(E)(i) provides that it is an exception to the prohibition contained in Section 1056(d)(3)(D)(i) against providing any "type or form of benefit, or any option, not otherwise provided under the plan." Thus, if a domestic relations order requires payment before retirement, and the requirements of Section 1056(d)(3)(E)(i) are not satisfied, then the order fails to satisfy Section 1056(d)(3)(D)(i) and is not a QDRO.

participant's actual retirement must be calculated "as if the participant had retired on the date on which such payment is to begin under [the QDRO] **(but taking into account only the present value of benefits actually accrued and not taking into account the present value of any employer subsidy for early retirement).**" ERISA § 1056(d)(3)(E)(i)(II) (emphasis added). Under this provision, an order that requires payment of an "employer subsidy for early retirement" prior to actual retirement cannot be a QDRO. The Senate Report concerning the Retirement Equity Act of 1984 ("REA") (the "Senate Report") sets forth how a calculation involving payments before retirement must be made:

> "When payments are made to an alternate payee before the participant retires, the payments are computed by taking into account only benefits actually accrued and not taking into account any employer subsidy for early retirement. The amount to be paid to the alternate payee is to be calculated by using the participant's **normal retirement benefit accrued as of the date payout begins and by actuarially reducing such benefit. . . .**" Senate Report No. 98-575, Reprinted in 1984 U.S. Code Cong. & Ad. News, Vol. 4, page 2567 (emphasis added).

The substantive dispute before the California Supreme Court was whether a QDRO could require payment of early retirement benefits under the Rule of 75 without the actuarial reduction described in the Senate Report. The California Supreme Court correctly held that the Rule of 75 early retirement benefit is an "employer subsidy for early retirement" that may not be paid under a QDRO prior to the

retirement of the Plan participant. The reasoning of the California Supreme Court is set forth at Petitioner's Appendix 17-26. The California Supreme Court's reasoning is sound, and its decision does not conflict with any other reported decision.

B. Petitioner's Question Presented Is Not Appropriate for Review.

The California Supreme Court considered the issue of whether a QDRO may require payment of the Rule of 75 benefit before a participant actually retires. Petitioner asks this Court to consider the much broader question of whether ERISA prohibits a QDRO from "referencing" an early retirement benefit. As explained below, the question presented by Petitioner does not arise under the facts of this case, was not addressed explicitly or implicitly by the California Supreme Court, and is therefore not an appropriate subject for review.

Although Petitioner does not thoroughly explain the theory behind the question she is presenting, the Plan believes the question is based upon an insupportable interpretation of the Order.[12] For the question presented by Petitioner to arise, the Order must be interpreted as containing only a "reference" to the Rule of 75 benefit, without requiring it to be paid. In this case, the Order awarded Petitioner a precisely specified percentage (36.6231%) of James Oddino's accrued benefit under the Plan. As explained below, Petitioner's interpretation of the

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[12] The Plan's belief concerning the issue presented by Petitioner is based upon similar arguments she presented to the California Supreme Court.

Order would assign Petitioner **much more** than the precise percentage of James Oddino's accrued benefit specified.

Petitioner apparently would treat the percentage specified in the Order as a **reference** to the Plan's Rule of 75 benefit. The following mathematical steps would then be applied to avoid **payment** of the Rule of 75 benefit. First, determine the dollar amount that would be awarded to Petitioner if she were to be awarded 36.6231% of the Rule of 75 benefit, without an actuarial reduction. Second, determine the percentage of the normal retirement benefit that is necessary -- after actuarial reduction -- to result in a payment to Petitioner of the dollar amount that resulted from the first step.[13] This larger percentage of the participant's benefit would be assigned to the Petitioner. The result would be to provide benefit payments commencing early to the alternate payee equal to the sought-after percentage of the early retirement benefit that would have been available if the participant had retired. At the same time, the benefit remaining for the participant would be reduced by a much greater percentage than the 36.6231% set forth in the Order.

The California Supreme Court did not address orders requiring the calculation described above, and nothing

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[13] The amount of the normal retirement benefit to be awarded to the alternate payee under this calculation would be determined by dividing the dollar amount determined in step 1 by the actuarial reduction for early commencement described in the Senate Report. Thus, for example, assume that the dollar amount determined under step 1 is $1,000 per month. The actuarial reduction factor in this case, based upon James Oddino's age at the time benefit payments to Petitioner commenced, was .4322. Thus, in order to provide for a benefit payment of $1,000 per month to the alternate payee commencing early, the alternate payee would be awarded $2,314 of the participant's normal retirement benefit.

expressly set forth in its decision would prevent an order requiring such a calculation. The Order at issue in this case, however, cannot reasonably be interpreted as requiring the calculation described above. Thus, the question presented by Petitioner does not arise in this case.[14]

C. Petitioner's Other Theories Do Not Warrant Review.

Petitioner attempts to attack the California Supreme Court's decision on a number of grounds, but, as explained below, she fails to present an issue that warrants review.

1. ERISA § 1054(g)(2) Is Not Implicated.

Petitioner incorrectly argues that the California Supreme Court's decision conflicts with ERISA § 1054(g)(2). (Pet. at 13.) Section 1054(g)(2) is not implicated by this case. Section 1054(g) prohibits plan amendments that eliminate or reduce early retirement benefits or "retirement-type subsidies." There is no amendment at issue in this case, and for that reason, Section 1054(g)(2) is not implicated.

The issue before the California Supreme Court was whether the Rule of 75 benefit constituted an "employer subsidy for early retirement" under ERISA § 1056(d)(3)(E)(i)(II) which could not be paid under a QDRO prior to a participant's actual retirement. The fact that a plan amendment was not involved is sufficient to conclude that the decision could not conflict with Section

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[14] The question presented by Petitioner has not been considered in any reported state or federal decision.

1054(g)(2). Furthermore, whether or not an early retirement benefit is considered subsidized under Section 1056(d)(3)(E)(i)(II), the benefit may not be eliminated or reduced by an amendment because of the prohibition of Section 1054(g)(2). The only reference to Section 1054(g)(2) in the decision is to note that it "prohibits amendment of a plan to eliminate an early retirement benefit or 'retirement-type subsidy.'" (Pet. App. 19.) The reference was made because the legislative history of REA defines "subsidy" for purposes of Section 1054(g)(2). The California Supreme Court's decision cannot, however, be read as constituting a holding under Section 1054(g)(2).

Several cases have considered whether early retirement benefits constitute "accrued benefits" under ERISA. The pre-REA version of Section 1054(g) prohibited plan amendments that reduced or eliminated accrued benefits. Most of the cases considering pre-REA law concluded that early retirement benefits were not accrued benefits.[15]

REA made the plan amendment cases obsolete by adding ERISA § 1054(g)(2), which provides that a plan amendment that eliminates or reduces an early retirement benefit is treated as an amendment reducing accrued benefits. Section 1054(g)(2) is limited by its own terms; it expressly

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[15] The appellate cases holding that early retirement benefits are not accrued benefits are *American Stores v. American Stores Retirement Plan*, 928 F. 2d 986 (9th Cir. 1991); *Tilley v. Mead Corporation*, 927 F. 2d 756 (4th Cir. 1991)(cert. denied 1992); and *Bencivenga v. Western Pennsylvania Teamsters and Employees Pension Fund*, 763 F. 2d 574 (3d Cir. 1985). The only appellate case holding to the contrary was *Amato v. Western Union International, Inc.*, 773 F.2d 1402 (2d Cir. 1985)(cert. dismissed *sub non*, *Western Union International v. Amato*, 474 U.S. 1113 (1986)(memorandum decision)).

applies **only** for purposes of Section 1054(g)(1), which contains ERISA's rule prohibiting amendments that reduce or eliminate accrued benefits. Petitioner ignores the limiting language of Section 1054(g)(2) and contends that the effect of Section 1054(g)(2) is to treat early retirement benefits as accrued benefits for purposes of the QDRO rule set forth in Section 1056(d)(3)(E)(i)(II). The treatment of early retirement benefits for QDRO purposes is governed by Section 1056(d)(3)(E)(i)(II), which prohibits payment of subsidized early retirement benefits prior to the participant's retirement. The pre-REA cases cited by Petitioner involve amendments, not QDROs or Section 1056. Thus, the California Supreme Court's decision that the Rule 75 benefit is an employer subsidy under Section 1056 does not conflict with any statutory or case authority.

2. Petitioner Erroneously Contends That ERISA's QDRO Subsidy Provision Does Not Apply To Plans.

QDRO payments prior to actual retirement may not take into account "the present value of any employer subsidy for early retirement." ERISA § 1056(d)(3)(E)(i)(II). Petitioner argues that this provision does not apply to benefits paid from a plan. In her view such benefits are not an "employer" subsidy. (Pet. at 12.)

Petitioner's assertion is simply incorrect. ERISA § 1056 **only** applies to payments from plans. The passage from the Senate Report that describes the required calculation of benefits under a QDRO prior to actual retirement clearly refers to an actuarial reduction of benefits payable from a plan. Furthermore, the language of Section 1056 itself demonstrates that Petitioner's argument is incorrect. Section 1056 restricts payments at early

retirement to the "present value of benefits actually accrued," and states that for purposes of applying this rule, "the interest rate assumption used in determining the present value shall be the interest rate **in the plan**. . . ." ERISA § 1056(d)(3)(E)(i)(II)(emphasis added). There is no reason to refer to a present value calculation under a plan if the reference is to payments other than by a plan.

It is not surprising that Congress used the term "employer subsidy for early retirement" to refer to early retirement benefits, such as the Rule of 75, that are payable from plan assets. Hughes, the employer and Plan sponsor, establishes the subsidy and pays for the subsidy through its contributions to the Plan.

3. Petitioner Overstates The Breadth Of The California Supreme Court's Decision.

ERISA § 1056(d)(3)(E)(i)(II) prohibits the payment of employer subsidized early retirement benefits under a QDRO prior to the participant's actual retirement. *See* discussion at pp. 19-21, *supra*. Petitioner erroneously contends that the California Supreme Court found that there was an employer subsidy in every early retirement benefit. The implication of Petitioner's contention is that the California Supreme Court's decision would prohibit payment of any early retirement benefit under a QDRO before actual retirement. She offers no explanation or citation for this overbroad assertion, which cannot be found in the decision. The decision expressly considered only the Plan's Rule of 75 benefit. The California Supreme Court properly held that the Rule of 75 benefit was subsidized because it has an actuarial value in excess of the Plan's normal retirement benefit, and, therefore, it could not be paid to Petitioner before James Oddino's actual retirement. (Pet. App. at 19.)

Under the logic of the decision, an early retirement benefit that has an actuarial value equal to the normal retirement benefit would not be considered subsidized and, therefore, could be paid under a QDRO before actual retirement.

4. Petitioner Incorrectly States That Actual Retirement Is Not Required For Payment Of The Rule Of 75 Benefit Under The Plan.

Petitioner attacks the California Supreme Court's citation of this Court's recent opinion in *Lockheed v. Spink* on the incorrect ground that the Plan does not require retirement as a prerequisite for payment of the Rule of 75 benefit. The Plan explicitly requires retirement as a prerequisite for payment of any early or normal retirement benefits. The QDRO rules under ERISA allow **limited** payments to an alternate payee prior to actual retirement, but those payments may not include subsidized early retirement benefits.

The subsidized early retirement benefit provided by the Rule of 75 is a clear example of the sort of *quid pro quo* that this Court recognized in *Lockheed* were inherent in employee benefit plans. Simply put: in order to obtain the valuable enhanced early retirement benefit under the Rule of 75, the employee must retire early.

III. NO ISSUE REGARDING RETROACTIVE PAYMENTS WARRANTS REVIEW.

Petitioner's third question concerns ERISA § 1056(d)(3)(H). She incorrectly reads this provision as entitling her to retroactive payments. The California Supreme Court's decision did not expressly consider this

issue. This was appropriate because the Order does not provide for retroactive payments (or, indeed, for payments governed by Section 1056(d)(3)(H)).

The Order was issued March 24, 1989, and was served upon the Plan shortly thereafter. The Order provided that payments to Petitioner were to commence "as of April 1, 1988 **or as soon thereafter as practical.**" (Emphasis added.) (Pet. App. 42.) Petitioner reads this provision as entitling her to payments commencing on April 1, 1988, almost a full year **before** the Order was issued. In other words, she reads the Order as if the emphasized provision did not exist.

Payments under the Order commenced in early 1990 which, under the circumstances, was as soon as practical. The Superior Court made the following findings and rulings concerning the timing of the commencement of benefit payments:

> "The [Plan] did not take an unreasonable amount of time to approve the Qualified Domestic Relations Order and to commence payments under the Qualified Domestic Relations Order. The payments under the Qualified Domestic Relations Order were in an amount sufficient to recompense Petitioner for the period of time prior to commencement of such payments." (Pet. App. 38.)

Section 1056(d)(3)(H) provides that the plan administrator is to separately account for amounts that would have been payable to an alternate payee during a period (up to 18 months) in which the issue of whether a domestic relations order is qualified is being determined. Petitioner

believes that the 18-month period should commence April 1, 1988 -- almost 12 months prior to the time the domestic relations order was even issued. She simply overlooks the description of the 18-month period which is set forth in the statute itself:

> "For purposes of this sub-paragraph, the 18-month period described in this clause is the 18-month period **beginning with the date on which the first payment would be required to be made under the domestic relations order.**" ERISA § 1056(d)(3)(H)(v) (emphasis added).

The Order does not require payments to commence as of April 1, 1988. Instead, it requires payments to commence "as soon thereafter as practical." Obviously, it could not have been "practical" for payments to commence prior to the date the Order was issued and served upon the Plan. Furthermore, even after the Order was issued and served, no payments were required until it was practical to make them. The separate accounting required under Section 1056(d)(3)(H), does not start until the first payments are required under the terms of the Order. The Superior Court that issued the Order determined explicitly that the Plan did not take an unreasonable amount of time to approve the Order and commence payments thereunder. As a result, there were no amounts required to be separately accounted for, and the issue Petitioner seeks to bring before the Court does not exist in this case.

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A: STATUTES

Selected provisions of Employee Retirement Income Security Act of 1974, as amended.

29 U.S.C. § 1054. Benefit Accrual Requirements

(a) **Satisfaction of requirements by pension plans**

Each pension plan shall satisfy the requirements of subsection (b)(3) of this section, and-

(1) in the case of a defined benefit plan, shall satisfy the requirements of subsection (b)(1) of this section; and

(2) in the case of a defined contribution plan, shall satisfy the requirements of subsection (b)(2) of this section.

(b) **Enumeration of plan requirements**

(1)(A) A defined benefit plan satisfies the requirements of this paragraph if the accrued benefit to which each participant is entitled upon his separation from the service is not less than--

(i) 3 percent of the normal retirement benefit to which he would be entitled at the normal retirement age if he commenced participation at the earliest possible entry age under the plan and served continuously until

the earlier of age 65 or the normal retirement age specified under the plan, multiplied by

(ii) the number of years (not in excess of 33⅓ of his participation in the plan.

In the case of a plan providing retirement benefits based on compensation during any period, the normal retirement benefit to which a participant would be entitled shall be determined as if he continued to earn annually the average rate of compensation which he earned during consecutive years of service, not in excess of 10, for which his compensation was the highest. For purposes of this subparagraph, social security benefits and all other relevant factors used to compute benefits shall be treated as remaining constant as of the current year for all years after such current year.

(B) A defined benefit plan satisfies the requirements of this paragraph or a particular plan year if under the plan the accrued benefit payable at the normal retirement age is equal to the normal retirement benefit and the annual rate at which any individual who is or could be a participant can accrue the retirement benefits payable at normal retirement age under the plan for any later plan year is not more than 133⅓ percent of the annual rate at which he can accrue benefits for any plan year beginning on or after such particular plan year and before such later plan year. For purposes of this subparagraph--

(i) any amendment to the plan which is in effect for the current year shall be treated as in effect for all other plan years;

(ii) any change in an accrual rate which does not apply to any individual who is or could be a participant in the current year shall be disregarded;

(iii) the fact that benefits under the plan may be payable to certain employees before normal retirement age shall be disregarded; and

(iv) social security benefits and all other relevant factors used to compute benefits shall be treated as remaining constant as of the current year for all years after the current year.

(C) A defined benefit plan satisfies the requirements of this paragraph if the accrued benefit to which any participant is entitled upon his separation from the service is not less than a fraction of the annual benefit commencing at normal retirement age to which he would be entitled under the plan as in effect on the date of his separation if he continued to earn annually until normal retirement age the same rate of compensation upon which his normal retirement benefit would be computed under the plan, determined as if he had attained normal retirement age on the date any such determination is made (but taking into account no more than the 10 years of service immediately preceding his separation from service). Such fraction shall be a fraction, not exceeding 1, the numerator of which is the total number of his years of participation in the plan (as of the date of his separation from the service) and the denominator of which is the total number of years he

would have participated in the plan if he separated from the service at the normal retirement age. For purposes of this subparagraph, social security benefits and all other relevant factors used to compute benefits shall be treated as remaining constant as of the current year for all years after such current year.

. . .

29 U.S.C. § 1144. Other Laws

. . .

(c) **Definitions**

(1) The term "State Law" includes all laws, decisions, rules, regulations or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.